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BEFORE THE ARIZONA CORPORATION COMMISSION
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Arizona Corporation Commission

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COMMISSIONERS

TOM FORESE – CHAIRMAN

ROBERT BURNS

DOUG LITTLE

ANDY TOBIN

BOYD DUNN

IN THE MATTER OF THE APPLICATION
OF ARIZONA PUBLIC SERVICE
COMPANY FOR A HEARING TO
DETERMINE THE FAIR VALUE OF THE
UTILITY PROPERTY OF THE COMPANY
FOR RATEMAKING PURPOSES, TO FIX A
JUST AND REASONABLE RETURN
THEREON, TO APPROVE RATE
SCHEDULES DESIGNED TO DEVELOP
SUCH RETURN.

DOCKET NO. E-01345A-16-0036

DOCKET NO. E-01345A-16-0123

**EMERGENCY MOTION OF
COMMISSIONER ROBERT BURNS
FOR RELIEF (1) CONFIRMING
THAT THE ADMINISTRATIVE LAW
JUDGE WILL FACILITATE
CALLING AND QUESTIONING OF
HEARING WITNESSES; AND (2)
APPROVAL OF HIS COUNSEL
PARTICIPATING IN QUESTIONING**

**(EXPEDITED RULING AND
SUSPENSION AND CONTINUANCE
OF HEARING REQUESTED)**

IN THE MATTER OF FUEL AND
PURCHASED POWER PROCUREMENT
AUDITS FOR ARIZONA PUBLIC SERVICE
COMPANY

I. Introduction

Prior to the start of the Arizona Public Service Company (APS) rate hearing on April 24, 2017, Commissioner Burns, through filings in this docket and request of counsel, identified a number of hearing witnesses from APS and Pinnacle West Capital Corporation (Pinnacle West) that he required and a series of questions he required to be asked of those and other witnesses (with reasonable follow-up questioning). At the commencement of the hearing, Commissioner Burns expressed through counsel his request and expectation that the Administrative Law Judge would cooperate in calling the required witnesses and asking the questions. He further suggested that if the Administrative Law Judge was not going to ask the questions submitted by him, his counsel be allowed to ask the questions, and that if the Judge was not going to allow that, the hearing be continued so Commissioner Burns can obtain appropriate relief. The Judge denied all these requests and advised counsel she was not going to decide this "dispute" and would only refer it to the Commissioners. She encouraged counsel to put any arguments about Commissioner Burns' requests and rights in writing and therefore effectively denied Commissioner Burns, especially through his counsel and designee, the right to participate in the hearing.¹ This motion seeks two things: (1) confirmation that Commissioner Burns' requested witnesses will be called and subject to the questioning he has requested; and (2) confirmation that either the Administrative Law Judge will ask the questions requested by Commissioner Burns, or, if she will not, confirmation that he can designate his counsel to take the lead in the questioning, or at a minimum, assist in his questioning.

¹ Neither the Judge nor the other Commissioners can limit Commissioner Burns' constitutional investigatory and hearing rights, which is what has happened, and the Commissioner hopes this motion will help them promptly reconsider without the Commissioner having to seek relief in court. This filing does not constitute any acknowledgement that such a filing before the Administrative Law Judge or Commission is required by any law or legal doctrine, or that Commissioner Burns is not entitled to seek direct relief through the courts of the State of Arizona which are able to immediately consider and enforce his constitutional rights. It is a cooperative attempt solely to expedite enforcement of the Commissioner's rights and the Judge's duties to all the Commissioners in a matter the Commissioners and Judge should, upon reflection, recognize implicates clearly established rights of a Commissioner and the state-wide constituency he serves.

1 **II. The Administrative Law Judge is Required to Facilitate the Examination of**
2 **Witnesses and to Turn the Requests Here Over to the Other Commissioners**
3 **Violates Commissioner Burns' Constitutional and Statutory Rights and the**
4 **Administrative Law Judge's Obligations.**

5 To carry out their constitutionally delegated powers to set rates and charges APS can
6 make and collect, the Arizona Constitution expressly vests each Commissioner with powers to
7 inspect and investigate properties, books, papers, businesses, methods, and affairs of any
8 public service corporation. The Arizona Constitution states, at Article XV, § 4:

9 The corporation commission, *and the several members thereof*, shall have power
10 to inspect and investigate the property, books, papers, business, methods, and
11 affairs of any corporation whose stock shall be offered for sale to the public and of
12 any public service corporation doing business within the state, and for the purpose
13 of the commission, *and of the several members thereof*, shall have the power of a
14 court of general jurisdiction to enforce the attendance of witnesses and the
15 production of evidence by subpoena, attachment, and punishment, which said
16 power shall extend throughout the state. Said commission shall have power to take
17 testimony under commission or deposition either within or without the state.

18 (Emphasis added).

19 Arizona's statutes also expressly acknowledge Commissioner Burns' individual and
20 independent authority to conduct inspections of the accounts, books, papers and documents of
21 any public service corporation, and to examine under oath any officer, agent or employee of
22 such corporations in relation to the business and affairs of the corporation. A.R.S. § 40-
23 241(A). The ongoing hearing is part of the traditional method by which the ACC
24 Commissioners execute their constitutionally-delegated investigatory powers.

25 The investigatory phase of a rate making hearing is not a political process in which the
26 majority of the Commissioners get to dictate what areas are inquired into, what witnesses are
27 called, and what questions may be asked. The majority will does not control. If there are any
28 restrictions on calling and questioning of witnesses, they are strictly substantive or based on
legally recognized privileges like the attorney-client advice privilege or 5th Amendment
incrimination. If the witnesses and the questions fall within the exceedingly broad
investigatory powers our courts have acknowledged were bestowed by the Arizona
Constitution on each Commissioner, there can be no valid objection. The breadth of each of

1 the Commissioners' individual investigatory powers are demonstrated by the Arizona Court of
2 Appeals' decision in *Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305 (App. 2000).

3 There the court explained:

4 . . . courts give the Commission "wide berth" when they review the validity of
5 Commission investigations. [citation omitted]. In fact, "an appropriately
6 empowered agency 'can investigate merely on suspicion that the law is being
7 violated, or even just because it wants assurance that it is not.'" [citations omitted].
8 In other words, "the Commission must be free without undue interference or delay
9 to conduct an investigation which will adequately develop a factual basis for a
10 determination as to whether particular activities come within the Commission's
11 regulatory authority." *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052-
12 53 (2nd Cir. 1973). *See also EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th
13 Cir. 1991) (court must enforce subpoena if agency makes plausible assertion of
14 jurisdiction and information sought is not plainly incompetent or irrelevant to any
15 lawful purpose of the agency).

16 As the Judge and the Commissioners know, and as has been recognized repeatedly by the
17 Arizona courts, constant exposure to deep scrutiny is the price APS and Pinnacle West pay for
18 the special economic benefits of being a state-sanctioned monopoly. *See Ariz. Corp. Comm'n v.*
19 *Ariz. ex rel. Woods*, 171 Ariz. 286, 290 (1992); *Davis v. Corp. Comm'n*, 96 Ariz. 215, 218 (1964)
20 ("The monopoly is tolerated only because it is to be subject to vigilant and continuous
21 regulation by the Corporation Commission, . . .")

22 Nor is there any legal authority for the "majority" of the Commissioners to veto what
23 witnesses another Commissioner gets to call or what questions he or she gets to ask during a
24 rate making evidentiary hearing. Given that both the Arizona Constitution and A.R.S. § 40-
25 241(A) empower individual Commissioners to investigate, the remainder of the
26 Commissioners have no right, separately or together, to interfere with this right and seek to
27 stop him from calling witnesses and asking questions. The Commission's rules also
28 necessarily afford each of the Commissioners the ability to proceed unimpeded by those on the
Commission who don't want to hear their questions asked. A.A.C. R14-3-109(A) provides
that hearings "will be held before one or more Commissioners, one or more Hearing Officers,
or any combination thereof," and R14-3-102(G) defines the "Presiding Officer" as a
"Commissioner or Hearing Officer conducting a hearing." Similarly, R14-3-109(G) specifies
when the "presiding officer or Commissioners" may examine witnesses, and R14-3-109(P)

1 authorizes individual Commissioners to take depositions; *see also* A.R.S. § 40-244(A)
2 (individual Commissioners can take depositions). The rules could not constitutionally create a
3 majority-rule prior restraint right against individual commissioner questioning, and, not
4 surprisingly, they authorize no such restraints. Rather, they contemplate the opposite.

5 Allowing the majority of the Commissioners to dictate what questions Commissioner
6 Burns may ask, and which witnesses he may call, also encourages the very regulatory capture
7 and commissioner disqualification concerns that are a focus of part of the questioning he
8 requires. The Arizona public has been inundated with press reports and published opinions
9 over the past several years questioning the financial benefits that may have been bestowed by
10 APS or Pinnacle West upon various sitting Commissioners through enormous campaign
11 expenditures, along with concern of Arizonans that the result is an improperly APS-biased
12 Commission with Commissioners unfit constitutionally to even decide cases in which millions
13 and millions of dollars are at stake to both consumers and APS and its parent. Commissioner
14 Burns and others have raised concerns with disqualification of other Commissioners to even
15 participate in APS proceedings, and those are responsible and legally supportable concerns.²
16 If indeed APS and Pinnacle West have managed to create through large spending of consumer-
17 generated funds voting support from other Commissioners, handing the decision to them to
18 quash further investigation into such links is the worst possible policy. It ensures a regulated
19 monopoly that if they just spend enough to capture the favor of 3 of the 5 Commissioners they
20 can not only influence outcomes on rate requests or any other matters in their favor but can
21 effectively preclude any investigation by the other Commissioners into their influence-
22 peddling. Taken to the extreme, it can encourage a regulated monopoly to even break
23 campaign finance or other laws prohibiting financial support of Commission candidates
24 knowing that, if they are successful, they will silence the investigatory powers of the minority
25 to expose such activity.

26
27
28 ² These concerns will be the subject of a separate motion by Commissioner Burns to be filed
shortly.

1 The Judge's refusal to act on Commissioner Burns' requests also implements an
2 inappropriate "veto" mechanism over entire witnesses and categories of questions that have
3 not even been asked before the full context of other testimony from APS and Pinnacle West
4 has even been established and with no consideration by the Judge at the outset to whether the
5 questions fall within the broad class of matters a Commissioner may inquire into. At a
6 minimum, given the broad investigatory powers of Commissioner Burns, objections would
7 need to be made on a question-by-question basis, and not on any sweeping categorical basis.

8 Instead, the appropriate control mechanism here is to allow Commissioner Burns to call
9 his desired witnesses and ask all his questions, and to put the burden on APS, Pinnacle West or
10 the individual witnesses to object if they believe substantively the questions fall outside the
11 broad investigatory powers acknowledged under the Constitution and Arizona legal precedent
12 or otherwise impinge upon legally recognized privileges. The regulated entity and associated
13 witnesses then risk being compelled to answer, and any other sanctions or negative outcome
14 that may ensue if their objections are not merited. But the witnesses are fully protected from
15 any legally inappropriate questioning. They neither need nor deserve the further protection of
16 a "cone of silence" imposed by other Commissioners, especially ones who might be exposed
17 as disqualified by the questioning.³

18 Finally, Commissioner Burns respectfully repeats his assertion in the hearing that the
19 Judge and other Commission staff who are employed for the benefit and assistance of the
20 Commission do not work simply for the "majority", and cannot, except in rare circumstances,
21 claim a "conflict" precludes the from helping Commissioner Burns in the same ways they help
22 the Commissioners perceived as a majority arrayed against him. Respectfully, the Judge is
23 being asked here to simply employ her delegated powers to require attendance of witnesses
24 and to ask questions posed by a Commissioner. She is already doing just that on a daily basis
25 in this hearing on behalf of Commissioners. She has not been asked in this instance to act as

26 ³ Each of the other Commissioners also has the right to submit or ask counter-questions or
27 supplemental questions. If they feel the need to elaborate on issues Commissioner Burns is
28 inquiring into, or even to help APS or Pinnacle West witnesses explain themselves, they can
submit appropriate questions.

1 counsel for Commissioner Burns or provide him legal advice. She is in no professional
2 capacity that creates a conflict that would justify denying his requests, and especially cannot
3 justify legally favoring the will of the majority of Commissioners about whom she calls and
4 what questions she asks. Indeed, where the recusal/disqualification of commissioners is at
5 issue, as it is here, to allow oneself to be directed by commissioners whose disqualification
6 might be compelled would merely facilitate such wrongful, unconstitutional participation.
7 Moreover, the Judge is legally protected in acting disinterestedly without favoring any of the
8 Commissioners over another. Commissioner retaliation against an administrative law judge
9 for evenly and consistently honoring the requests of all Commissioners for witnesses and
10 questioning would undoubtedly be unlawful and give rise to claims against any
11 Commissioners who might engage in retaliation.

12 For all these reasons, and because the Arizona Constitution vests investigatory authority
13 separately in each individual Commissioner, the Judge's refusal to act on Commissioner
14 Burns' requests to call the APS and Pinnacle West witnesses and to assist in their questioning
15 is unconstitutional, violates the Commissioner's statutory rights, is arbitrary and capricious and
16 is an abuse of discretion. Any actions by the remaining Commissioners to limit Commissioner
17 Burns in having the witnesses called and questioned would be similarly unlawful. There is no
18 need for further consideration. The Judge should immediately reverse her decision and
19 implement Commissioner Burns' appropriate investigatory requests.

20 Commissioner Burns seeks expedited confirmation therefore from the Administrative
21 Law Judge that he will be able to exercise his constitutional and statutory investigatory powers
22 during the pending hearing, and have the assistance of the Administrative Law Judge in calling
23 all appropriate witnesses and in allowing the questioning of those witnesses he desires (subject
24 to appropriate witness objections).

25
26 **III. Commissioner Burns Requests that his Counsel be Permitted to Conduct**
27 **Questioning and Assist the Commissioner.**
28

1 In addition to seeking confirmation that he will get assistance from the Administrative
2 Law Judge calling the witnesses he requires and facilitating the questioning he requires,
3 Commissioner Burns seeks assistance of counsel in questioning of hearing witnesses. There is
4 little doubt that his initial questions will require follow-up, just as the other questioning being
5 done at this hearing regularly requires follow-up questions. Commissioner Burns requests
6 confirmation he can utilize assistance from his counsel in asking necessary follow-up
7 questions to those posed for him by the Judge. He would even accept the Administrative Law
8 Judge turning the questioning he desires over entirely to him and his counsel. Nothing in
9 Arizona' statutes or the Commission's rules forbids this practice; to the contrary, A.R.S. § 40-
10 243(A) provides in part that "no informality in any proceeding or in the manner of taking
11 testimony before the commission or a commissioner shall invalidate any order, decision, rule
12 or regulation made, approved or confirmed by the commission." *See also* A.A.C. R14-3-
13 109(K) (similar language). Commissioner Burns is not seeking to abandon his function as a
14 Commissioner/adjudicator; he asks only for help questioning witnesses, an informality
15 consistent with A.R.S. § 40-243(A).

16 The Commissioners' respective policy advisors regularly accompany their
17 Commissioners to open meetings and staff meetings and attend other Commission matters,
18 often to provide real-time advice or guidance to the Commissioners. Commissioner Burns'
19 policy advisor is currently out of the country. Allowing Commissioner Burns' counsel to
20 fulfill a similar role, but actually ask questions, is not meaningfully different. And it would be
21 unduly formalistic, time-consuming and cumbersome for Commissioner Burns' counsel to
22 provide questions to the Commissioner when counsel could just as easily ask them himself.

23 Counsel for APS objected at the outset of this hearing that questioning by
24 Commissioner Burns' counsel was inappropriate because he already has counsel to help him
25 on the ACC staff, and apparently because questioning by counsel posed the risk that
26 information reflecting adversely on APS or its witnesses might be derived. If the sole
27 objective of this hearing is to ensure that APS and its witnesses not be subjected to effective
28 examination that might prove concerns exist with their rate request or other fundamental

1 Commissioner disqualification issues, then the hearing is a sham. Instead, the purpose is to get
2 to the relevant facts, whether APS likes them or not. The Commission is designed to protect
3 consumer interests. *Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. at 308, 138 P. at 786; *see*
4 *also Woods*, 171 Ariz. at 291, 830 P.2d at 811. And while APS and Pinnacle West, or even
5 other Commissioners, may not want Commissioner Burns to require disclosure of facts
6 negative to APS and its rate request strategy, the fact that they feel they have something to lose
7 by such questioning would be all the more reason to require a searching inquiry. It is the very
8 least degree of respect Arizona's consumers deserve.

9 Moreover, the legal staff of the ACC has already taken steps that indicate their conflicts
10 in advising Commissioner Burns or assisting him in his questioning. Commissioner Burns
11 does not consider the ACC's counsel available to him as APS contends. Nor should he have to
12 given the sanctity of the attorney-client relationship and the client's right to pick their counsel
13 and not have an attorney thrust upon them. Indeed, Commissioner Burns suspects ACC legal
14 counsel may have even already provided advice or input to other Commissioners on the issues
15 raised here. Commissioner Burns is entitled to separate representation by outside counsel of
16 his choice.

17 **IV. Conclusion and Request to Suspend and Continue Hearing.**

18 In conclusion, Commissioner Burns asks the Administrative Law Judge to immediately
19 confirm that: 1) the Judge will assist Commissioner Burns in calling the APS and Pinnacle
20 West witnesses he has requested to testify; and 2) that the Judge will facilitate the questioning
21 and follow-up questioning Commissioner Burns desires of such witnesses (subject to legally
22 appropriate objections from the witnesses themselves) by either asking the initial questions
23 herself or allowing Commissioner Burns and his counsel to ask follow-up questions, or by
24 turning over the entire questioning to Commissioner Burns and his delegated counsel.

25 As the hearing is underway, time is of the essence. Commissioner Burns therefore
26 requests that the Judge either immediately suspend and continue the hearing pending her
27 resolution of this motion or issue a ruling by the close of this week that will allow him, if the
28 ruling is adverse, to seek appropriate and meaningful judicial intervention before he and the


BASKIN RICHARDS PLC
2901 N. Central Avenue, Suite 1150
Phoenix, Arizona 85012
Telephone 602-812-7979
Facsimile 602-595-7800

1 constitutional and constituent interests he represents can be prejudiced by the continuation of
2 the hearing without his witnesses and questions.

3 In the alternative, if the Judge determines over Commissioner Burns' objection to turn
4 this matter over to the Commissioners as a whole, Commissioner Burns further requests an
5 immediate suspension and continuance of the hearing to avoid similar prejudice while he and
6 the other Commissioners assess the next steps.

7
8 DATED this 26th day of April, 2017.

9 BASKIN RICHARDS PLC

10
11 
12 William A. Richards
13 Alan Baskin
14 2901 North Central Avenue, Suite 1150
15 Phoenix, Arizona 85012
16 *Attorneys for Commissioner Robert*
17 *Burns*

18 ORIGINAL and thirteen (13) copies
19 of the foregoing filed in Docket Nos.
20 E-01345A-16-0036 and E-01345A-16-0123
21 this 26th day of April, 2017 with:

22 Docket Control
23 ARIZONA CORPORATION COMMISSION
24 1200 West Washington Street
25 Phoenix, AZ 85007

26
27 **CERTIFICATION OF SERVICE**

28 On this 26th day of April, 2017, the foregoing document was mailed on behalf of
Commissioner Burns to the following who have not consented to email service. On this date,
or as soon as possible thereafter, the Commissioner's eDocket program will automatically
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1 Matthew E. Price
2 JENNER & BLOCK
3 1099 New York Ave., NW, Suite 900
4 Washington, D.C. 20001-4412

4 Thomas Jernigan
5 Federal Executive Agencies
6 U.S. Airforce Utility Law
7 Field Support Center
8 139 Barnes Drive, Suite 1
9 Tyndall Air Force Base, FL 32403
10 thomas.jernigan.3@us.af.mil
11 ebony.payton.crt@us.af.mil
12 andrew.unsicker@us.af.mil
13 lanny.zieman.1@us.af.mil
14 natalie.cepak.2@us.af.mil
15 **Consented to Service by Email**

12 Kurt Boehm
13 BOEHM, KURTZ & LOWRY
14 36 E. Seventh St., Suite 1510
15 Cincinnati, OH 45202

15 Nicholas J. Enoch
16 LUBIN & ENOCH, PC
17 349 N. Fourth Ave.
18 Phoenix, AZ 85003

18 Richard Gayer
19 526 W. Wilshire Dr.
20 Phoenix, AZ 85003
21 rgayer@cox.net
22 **Consented to Service by Email**

22 T. Hogan
23 ARIZONA CENTER FOR LAW IN THE
24 PUBLIC INTEREST
25 514 W. Roosevelt Street
26 Phoenix, AZ 85003

26 Greg Patterson
27 MUNGER CHADWICK
28 916 W. Adams, Suite 3
Phoenix, AZ 85007

Timothy J. Sabo
SNELL & WILMER, LLP
One Arizona Center
400 East Van Buren, 19th Floor
Phoenix, AZ 85004
tsabo@swlaw.com
jhoward@swlaw.com
docket@swlaw.com
pwalker@conservamerica.org
Consented to Service by Email

Michael Patten
SNELL & WILMER, LLP
One Arizona Center
400 East Van Buren Street
Phoenix, AZ 85004
mpatten@swlaw.com
jhoward@swlaw.com
docket@swlaw.com
BCarroll@tep.com
Consented to Service by Email

Thomas A Loquvam
PINNACLE WEST CAPITOL
CORPORATION
400 N. Fifth St, MS 8695
Phoenix, AZ 85004
Thomas.Loquvam@pinnaclewest.com
Thomas.Mumaw@pinnaclewest.com
Melissa.Krueger@pinnaclewest.com
Amanda.Ho@pinnaclewest.com
Debra.Orr@aps.com
prefo@swlaw.com
Consented to Service by Email

Albert H. Acken
One N. Central Ave., Ste. 1200
Phoenix, AZ 85004
aacken@rcalaw.com
ssweeney@rcalaw.com
slofland@rcalaw.com
jjw@krsaline.com
Consented to Service by Email

1 Timothy M. Hogan
2 ARIZONA CENTER FOR LAW IN THE
3 PUBLIC INTERST

4 514 W. Roosevelt St.
5 Phoenix, AZ 85003

6 thogan@aclpi.org
7 ken.wilson@westernresources.org
8 schlegelj@aol.com

9 ezuckerman@swenergy.org
10 bbaatz@aceee.org

11 briana@votesolar.org
12 cosuala@earthjustice.org
13 dbender@earthjustice.org

14 cfitzgerrell@earthjustice.org
15 **Consented to Service by Email**

16 Andy Kvesic
17 ARIZONA CORPORATION
18 COMMISSION

19 Director- Legal Division
20 1200 West Washington
21 Phoenix, AZ 85007

22 LegalDiv@azcc.gov
23 utildivservicebyemail@azcc.gov

24 MScott@azcc.gov
25 CHains@azcc.gov

26 WVanCleve@azcc.gov
27 TFord@azcc.gov

28 EVanEpps@azcc.gov
CFitzsimmons@azcc.gov

KChristine@azcc.gov
EABinah@azcc.gov

Consented to Service by Email

22 Anthony Wanger
23 IO DATA CENTERS, LLC
24 615 N. 48th St
25 Phoenix Arizona 85008

Cynthia Zwick
ARIZONA COMMUNITY ACTION
ASSOCIATION

2700 N. Third St., #3040
Phoenix, AZ 85004

czwick@azcaa.org
khengehold@azcaa.org
Consented to Service by Email

Daniel Pozefsky
RUCO
1110 West Washington, Suite 220
Phoenix Arizona 85007

Jay I. Moyes
MOYES SELLERS & HENDRICKS, LTD
1850 N. Central Ave., #1100
Phoenix, AZ 85004

JasonMoyes@law-msh.com
jimoyes@law-msh.com
jim@harcuvar.com
Consented to Service by Email

Giancarlo Estrada
KAMPER ESTRADA, LLP
3030 N. 3rd Street, Suite 770
Phoenix, AZ 85012

gestrada@law.phx.com
kfox@kfwlaw.com
kcrandall@eq-research.com
Consented to Service by Email

Mary R. O'Grady
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012

1 Meghan H. Grabel
2 OSBORN MALEDON, PA
3 2929 N. Central Avenue, Suite 2100
4 Phoenix, AZ 85012

5 mgrabel@omlaw.com
6 gyaquinto@arizonaic.org
7 **Consented to Service by Email**

8 Craig A. Marks
9 CRAIG A. MARKS, PLC
10 10645 N. Tatum Blvd.
11 Suite 200-676

12 Phoenix, AZ 85028
13 Craig.Marks@azbar.org
14 Pat.Quinn47474@gmail.com
15 **Consented to Service by Email**

16 Ann-Marie Anderson
17 WRIGHT WELKER & PAUOLE, PLC
18 10429 South 51st Street, Suite 285
19 Phoenix, AZ 85044

20 aanderson@wwpfirm.com
21 sjennings@aarp.org
22 aallen@wwpfirm.com
23 john@johncoffman.net
24 **Consented to Service by Email**

25 Dennis M. Fitzgibbons
26 FITZGIBBONS LAW OFFICES, PLC
27 P.O. Box 11208
28 Casa Grande, AZ 85230

denis@fitzgibbonslaw.com
Consented to Service by Email

Court S. Rich
ROSE LAW GROUP, PC
7144 E. Stetson Drive, Suite 300
Scottsdale, AZ 85251

crich@roselawgroup.com
hslaughter@roselawgroup.com
cledford@mcdonaldcarano.com
Consented to Service by Email

Scott S. Wakefield
HIENTON & CURRY, PLLC
5045 N. 12th Street, Suite 110
Phoenix, AZ 85014-3302
swakefield@hclawgroup.com
mlougee@hclawgroup.com
Stephen.chriss@wal-mart.com
Greg.tillman@walmart.com
chris.hendrix@wal-mart.com
Consented to Service by Email

Garry D Hays
LAW OFFICES OF GARRY D. HAYS
2198 East Camelback Road, Suite 305
Phoenix, AZ 85016
ghays@lawgdh.com
Consented to Service by Email

Patrick J. Black
FENNEMORE CRAIG, P.C.
2394 E. Camelback Rd, Ste. 600
Phoenix, AZ 85016
pblack@fclaw.com
khiggins@energystrat.com
Consented to Service by Email

John William Moore, Jr.
MOORE BENHAM & BEAVER, PLC
7321 N. 16th Street
Phoenix, AZ 85020

Tom Harris
ARIZONA SOLAR ENERGY
INDUSTRIES ASSOCIATION
2122 W. Lone Cactus Dr. Suite 2
Phoenix Arizona 85027
Tom.Harris@AriSEIA.org
Consented to Service by Email

Lawrence V. Robertson, Jr.
210 Continental Road, Suite 216A
Green Valley, AZ 85622
tubaclawyer@aol.com
Consented to Service by Email

1 Thomas E. Stewart
2 GRANITE CREEK POWER &
3 GAS/GRANITE CREEK
4 FARMS
5 5316 East Voltaire Avenue
6 Scottsdale, AZ 85254-3643
7 tom@gcfaz.com
8 **Consented to Service by Email**

9 Greg Eisert
10 SUN CITY HOME OWNERS
11 ASSOCIATION
12 10401 W. Coggins Drive
13 Sun City, AZ 85351
14 gregeisert@gmail.com
15 steven.puck@cox.net
16 **Consented to Service by Email**

17 Albert E. Gervenack
18 SUN CITY WEST PROPERTY OWNERS
19 & RESIDENTS
20 ASSOCIAT
21 13815 Camino Del Sol
22 Sun City West, AZ 85375
23 al.gervenack@porascw.org
24 rob.robbins@porascw.org
25 Bob.miller@porascw.org
26 **Consented to Service by Email**

27 By: Lynn Jahnke
28 Lynn Jahnke, Executive Aide to
Commissioner Bob Burns

L. Robertson, Jr.
210 Continental Road, Suite 216A
Green Valley, AZ 85622

Charles Wesselhoft
Pima County Attorney's Office
32 North Stone Avenue, Suite 2100
Tucson, AZ 85701
Charles.Wesselhoft@pcao.pima.gov
Consented to Service by Email

Warren Woodward
200 Sierra Road
Sedona, AZ 86336
w6345789@yahoo.com
Consented to Service by Email

Robert Pickels, Jr.
Sedona City Attorney's Office
102 Roadrunner Drive
Sedona, AZ 86336
rpickels@sedonaaz.gov
Consented to Service by Email

Patricia C. Ferre
P.O. Box 433
Payson, AZ 85547
pFerreact@mac.com
Consented to Service by Email